DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-13/50545

PRELIMINARY RECITALS

Pursuant to a petition filed September 18, 2001, under Wis. Stat. §49.45(5) and Wis. Admin. Code §HA 3.03(1), to review a decision by the Dane County Department of Human Services in regard to Medical Assistance (MA), a hearing was held on October 15, 2001, at Madison, Wisconsin.

The issue for determination is whether assets of the petitioner's may be allocated to his community spouse to increase her monthly income, pursuant to "spousal impoverishment" rules.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:	Represented by:
(petitioner)	Atty. James A. Jaeger P. O. Box 3006 Madison, WI 53704

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Kathy Keller, E.S. Supr.
Dane County Dept. of Human Services
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxx) is a resident of Dane County. He was admitted to a nursing home on June 1, 2001. His wife continues to reside in the community.

2. The petitioner applied for MA on August 31, 2001. An asset assessment was completed in September, and the agency determined that the couple's combined assets in June, 2001, were

$86,364.25. The applicable Community Spouse Asset Share (CSAS) for this couple was $50,000. The agency issued written notice of MA denial on September 12, 2001; the basis for denial was excess assets. See Exhibit 1.

3. The petitioner's community spouse has monthly income, not including investment income referenced in Finding #5, of $230 monthly (Social Security).

4. The petitioner has monthly income, not including investment income referenced in Finding #5, of $410 monthly (Social Security).

5. In June, 2001, the petitioner and his wife owned the following assets:

Checking Account #xxxxxxx	$ 1,273.74
Checking Account #xxxxxxx	25,148.06
Savings Account #xxxxxxx	1,448.67
Cert. of Deposit #xxxxxxx	1,000.00
Cert. of Deposit #xxxxxxx	5,000.00
Cert. of Deposit #	15,000.00
AAL Annuity	50,000.00
Total	$98,870.47

6. The petitioner's wife's monthly income of $230 is well under the Minimum Monthly Maintenance Needs Allowance (MMMNA) of $2,060.50. The petitioner seeks to have his CSAS increased to an amount that will allow retention of all of the assets listed in Finding #5. The Finding #5 assets generate income of approximately $314.89 every month. See Exhibit 5. The only asset listed that does not generate income is the $1,273.24 checking account.

DISCUSSION

Introduction

The issue presented in this case is whether the petitioner is MA eligible, based on spousal impoverishment rules, where the household's assets exceed the special $50,000 asset limit, and the community spouse has income that falls below the Minimum Monthly Maintenance Needs Allowance (MMMNA, or "income allowance").

"Spousal impoverishment" rules were created with passage of the federal Medicare Catastrophic Coverage Act of 1988 (MCCA), which included extensive changes in state Medicaid (MA) eligibility determinations in cases involving married persons. In spousal impoverishment cases, the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. Wis. Stat. §49.455(1). Generally, no income of a community spouse is considered to be available for use by the other spouse during any month in which that other spouse is institutionalized. Wis. Stat. § 49.455(3).

The MCCA created *asset* eligibility limits for spousal impoverishment households that are more generous than those for a non-spousal impoverishment household (e.g., $2,000 for a single person). The MCCA also established a MMMNA/*income* allowance for the community spouse at a specified percentage of the federal poverty line. This income allowance is the amount of monthly income deemed necessary for the community spouse to live on. However, a community spouse may prove through the fair hearing process

that she has financial need above the MMMNA based upon exceptional circumstances resulting in financial duress. Wis. Stat. § 49.455.

Establishing the Asset Limit in a Spousal Impoverishment Case

When initially determining whether an institutionalized spouse is MA eligible, county agencies review the combined assets of the institutionalized spouse and the community spouse. *MA Handbook*, Appendix 23.4.1. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the CSAS (i.e., an asset limit) to determine eligibility.

MA Handbook, Appendix 23.4.1, explains the asset eligibility determination process: First, a (CSAS) is calculated as follows: **(1)** If the couple's total countable assets are $174,000 or more, the CSAS is $87,000; **(2)** If the couple's total countable assets are less that $174,000 but greater than $100,000, the CSAS is 1/2 of the total countable assets of the couple; and **(3)** if the total countable assets of the couple are $100,000 or less, the CSAS is $50,000. Wis. Stat. § 49.455(6)(b)3. *MA Handbook*, Appendix 23.4.2.

Second, $2,000 (the MA asset limit for the institutionalized individual) is then added to the CSAS to determine the total asset allowance for the couple. Generally, if the couple's assets are at or below the determined asset allowance, the institutionalized spouse is eligible for MA. If the assets exceed the asset allowance calculated for the couple, the institutionalized spouse is not MA eligible.

In this case, the parties do not dispute the couple's assets at the time of nursing home entry were under $100,000. Based upon the above, the amount of assets the couple would be allowed to retain would be $52,000 -- with $2,000 of that amount being retained by the institutionalized spouse seeking MA eligibility. Therefore, per the assessment, the petitioner and his community spouse exceeded the $52,000 MA asset limit by $46,870.47.

As an exception to the general rule, the CSAS may be increased, through the fair hearing process, if the assets generate income on a monthly basis and are necessary to raise the community spouse's income to the MMMNA. Wis. Stat. § 49.455(8)(d), Wis. Admin. Code § HFS 103.075(8)(c). As of May 1, 2001, the MMMNA was defined as the lesser of $2,175 or $1,935 plus excess shelter costs. *MA Handbook*, Appendix 23.6.0. The agency and the petitioner agree that the MMMNA in this case is $2,060.50 ($1,935 plus excess shelter costs).

The petitioner does not assert that the community spouse requires more than the designated $2,060.50 income allowance to continue residing in the community. However, petitioner asserts the couple should be able to retain assets above the $52,000 asset limit in order to generate income to reach the MMMNA to which the community spouse is entitled. He requests that the couple be allowed to retain the assets in Finding #5, thus asking this administrative law judge to find that $98,870.47 in assets are necessary to generate a monthly income which will approach or meet the MMMNA.

The pertinent state statute, Wis. Stat. § 49.455(6),(8), allows an administrative law judge (ALJ) to increase the CSAS/resource allowance under limited circumstances:

> **(6)** PERMITTING TRANSFER OF RESOURCES TO COMMUNITY SPOUSE**.**
>
> …
>
> (b**)** The community spouse resource allowance equals the amount by which the amount of resources otherwise available to the community spouse is exceeded by the greatest of the following: . . .
>
> 3. The amount established in a fair hearing under sub. (8)(d).

…

(8) FAIR HEARING. …

(d) If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), *the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an amount to be used under (6)(b)3 unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b)* . . .

(Emphasis added.)

Based upon the above, an administrative law judge (ALJ) is allowed to bypass the CSAS by determining assets in excess of the limit are necessary *to generate income up to the MMMNA for the community spouse*. Therefore, the above provision has been interpreted to allow an ALJ to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the asset allowance. See MED-62/94792, MED-36/93977.

This is Not a *Blumer* Case

As an aside, Wisconsin statutes also direct the department to require the institutionalized spouse to ***first*** make all *his income* available to his community spouse before additional *assets* above the CSAS are allowed to be retained by the community spouse to raise her income to the MMMNA.

Prior decisions of this office have have followed the statute's "income first" MA processing directive. One such decision, MED-23/12842 (*Blumer*), was appealed to the Wisconsin Supreme Court. In *Blumer v. DHFS*, 2000 WI App 150, 237 Wis. 2d 810, __ N.W. 2d __, the Wisconsin Supreme Court concluded that the final sentence of Wis. Stat. § 49.455(8)(d) (underlined above) violated the mandate of the federal MCCA. The *Blumer* court held that an administrative law judge must first allocate resources to maximize the community spouse's income, and only if the income generated by those resources does not bring the community spouse's income up to the MMMNA can the institutionalized spouse's income be allocated to the community spouse. The *Blumer* decision is on appeal to the United States Supreme Court, but currently it is the law that must be followed.

However, I referred to this two paragraph discussion of the Blumer decision as an aside, because Blumer probably makes no difference in this case. This is because the income levels of both spouses are so low: $230 and $410, for a total of $640. When the income from the assets ($314.89) is added to their joint income, the total is only $954.89, which is well below the $2,060.50 MMMNA.

Conclusion

Those assets of the petitioner's which are generating a reasonable investment return must be allocated to the community spouse to raise her monthly income to an amount that is closer to the MMMNA. With the exception of the $1,273.74 checking account, the assets are generating a reasonable investment return, and are therefore appropriately allocated. The CSAS for this household shall be increased to $97,596.73 ($98,879.47 – 1,273.74). Because the petitioner may have been financially eligible under the new asset limit ($97,596.73 CSAS + $2,000), this case will be remanded to the county agency for a new eligibility determination.

CONCLUSIONS OF LAW

1. The CSAS for this household shall be increased to $97,596.73, in order to increase the community spouse's income to a level approaching (but not exceeding) the MMMNA.

NOW, THEREFORE, it is ORDERED

That the petition herein be remanded to the county agency with instructions to increase the Community Spouse Asset Share to $97,596.73, for the petitioner's household, effective May 1, 2001, and to redetermine the petitioner's MA eligibility pursuant to his August, 2001, application, within 10 days of the date of this Decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this9th day of November, 2001

/sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
1121/NJG MRAassalloc

cc:

Faith-Barnett - Dane Co. - e-mail
Susan Wood
James A. Jaeger-Hill, Glowacki, Jaeger, Reiley, et al